

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MORGAN STANLEY & CO., INC., et al.,
 Plaintiffs,
 vs.
 SHRINERS HOSPITAL FOR CHILDREN, et al.,
 Defendant.

Case No. 2:09-cv-00398-JCM-PAL

ORDER

(Mtn to Compel - Dkt. #68)

The court held a hearing on Interpleader Defendant Joseph Surace's Motion to Compel Discovery Against Plaintiff Morgan Stanley & Co., Inc. (Dkt. #68) on December 14, 2010. Present at the hearing were F. Christopher Austin, Nathan Sosa, John Wright, and William Stoddars. The court has considered the Motion to Compel, Interpleader Defendant The Estate of Maurits Jozef Van Praag's Response (Dkt. #74), Plaintiff Morgan Stanley's Response (Dkt. #78), and the arguments of counsel at the hearing.

Defendant Surace seeks an order of the court compelling Plaintiff Morgan Stanley to fully respond to written requests for discovery propounded February 8, 2010. Defendant Surace asserts that Morgan Stanley's responses are both evasive and incomplete because they state things like "Respondent cannot confirm . . . Respondent cannot at this time confirm . . . Respondent cannot at this time independently confirm" and the like. Counsel have been engaged in meet and confer efforts concerning Morgan Stanley's responses since September 10, 2010. On that date, counsel for Morgan Stanley agreed to obtain more substantive supplemental responses from his client. Defendant Surace has not received any supplemental responses.

In response, Defendant Estate argues that the Motion to Compel was filed merely a delay tactic rather than a sincere effort to obtain discovery. The Estate asserts that it has received over three hundred

1 pages of documents from Morgan Stanley, which were produced to all parties. Although the Estate
2 concedes that “arguably Morgan Stanley could have used more definitive language in its responses,” it
3 states that Morgan Stanley’s answers are sufficient and provide the necessary information required.

4 Morgan Stanley asserts that its responses to Defendant Surace’s written discovery requests are a
5 truthful statement of the facts to the extent Morgan Stanley can ascertain them, and Morgan Stanley has
6 produced all of the documents that Defendant Surace requested. Morgan Stanley states that aside from
7 records maintained by Mr. Omel, the former financial advisor for Mr. Van Praag, and Mr. Omel’s
8 deposition testimony, Morgan Stanley has been unable to locate or identify any written or electronic
9 records indicating a Transfer on Death request was ever submitted by Mr. Van Praag. The branch
10 office that serviced Mr. Van Praag is closed, and Morgan Stanley no longer employs anyone who would
11 have actual knowledge of any Transfer on Death request made by Mr. Van Praag. Because Morgan
12 Stanley cannot confirm the testimony of Mr. Omel, its responses that it “cannot confirm” certain facts
13 are complete.

14 During oral argument the court inquired of counsel for Morgan Stanley what efforts had been
15 made to meet his client’s discovery obligations to determine whether it had any responsive documents.
16 Litigation counsel has been in contact with in house counsel who explained the difficulties in
17 attempting to locate responsive documents or definitively determine they do not exist.

18 Having reviewed and considered the matter, the court finds Morgan Stanley’s responses to the
19 disputed discovery requests evasive and will require Morgan Stanley to supplement its discovery
20 responses to indicate that after diligent search has been conducted the responsive documents either do
21 or do not exist. If responsive documents are located they shall be produced.

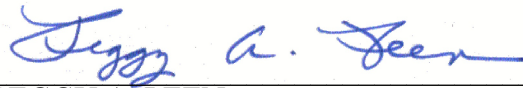
22 Having reviewed and considered the matter, and good cause appearing,

23 **IT IS ORDERED:**

- 24 1. Defendant Surace’s Motion to Compel (Dkt. #68) is GRANTED. Morgan Stanley shall
25 supplement its responses to written discovery propounded by Defendant Surace on or
26 before **December 29, 2010**, to confirm that a diligent search for responsive documents
27 has been conducted and that the documents either do or do not exist. If responsive
28 documents are located they shall be produced.

2. Morgan Stanley shall be precluded from supporting or opposing claims or defenses based on documents not produced or introducing or relying on, at trial or in pretrial motion practice, any document or information that it has not disclosed during discovery.

Dated this 14th day of December, 2010.



PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE